IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

J U D G M E N T

C.C.E. Jaipur vs. M/s Banswara Syntex Ltd

(D.B.CIVIL EXCISE APPEAL NO.02/05)

Union of India VS. SPBL Ltd. & Ors.

(D.B.CENTRAL EXCISE APPEAL NO.52/06)

Union of India VS. Rajasthan Spinning & Weaving Mills Ltd. & Anr.

(D.B.CENTRAL EXCISE APPEAL NO.61/06)

Union of India VS. M/s Hindustran Processors Ltd. & Anr.

(D.B.CENTRAL EXCISE APPEAL NO.13/05)

C.C.E. VS. M/s S.B.Marbles (P) Ltd.

(D.B.O.T.R.CASE NO.34/04)

Union of India VS. M/s Vimal Textile Mills.

(D.B.CENTRAL EXCISE APPEAL NO.31/06)

DATE OF JUDGMENT : 2nd March, 2007

P R E S E N T

HON'BLE MR.JUSTICE RAJESH BALIA

HON'BLE MR.JUSTICE GOPAL KRISHAN VYAS

Mr.V.K.Mathur], for the appellants
Mr.K.K.Bissa]

Mr.Rajendra Mehta,] for the respondents.
Mr.Dinesh Mehta,]
Mr.Sanjeev Johari,]

BY THE COURT: (PER HON'BLE JUSTICE RAJESH BALIA)

D.B.CENTRL EXCISE APPEAL NO.61/06:

The following substantial question of law has been framed in this appeal for consideration:-

> "Whether in the facts and circumstances of the case,the Tribunal has discretion to reduce the penalty leviable under Section 11AC of the Act?"

In this case penalty equal to short levied duty was imposed with reference to Section 11AC though the notice was given only under Section 173 Q for alleged breach of the Rules but the penalty equal to duty was decided to be levied with reference to Section 11AC and not to be levied with reference to Rule 173Q.

D.B.CENTRAL EXCISE APPEAL NO.13/2005

The following substantial question of law has been framed in this appeal for consideration:-

> "Whether the learned Tribunal is right in law in reducing the mandatory penalty imposable as equal to the amount of duty imposable under Sec.11AC of the Central Excise Act, 1944?"

A show cause notice was issued for alleged short levy on excess stock found on verification with the one shown in the register maintained for that purpose. Apart from issuing show cause notice for levy of duty, notice for levy of penalty under Section 173Q as well as 11AC was issued for alleged breach of Rules and ultimately adjudicating authority decided to levy penalty under Section 11AC for the alleged breach of Rules.

D.B.O.T.R.NO:2/2005:

Following substantial question of law has been referred for for opinion in this appeal:-

> "Is Tribunal empowered to reduce the mandatory penalty imposed under Section 11AC of the Central

Excise Act, 1944, while upholding the demand of duty ?"

A show cause notice was issued to the respondent assessee that the assessee has wrongly availed benefit of exemption under notification dated 2/6/1998. Along with show cause notice for the alleged short levy of duty, notice to levy penalty for the same was issued under Section 11AC read with Rule 173Q. The adjudicating authority had raised a demand of short levy of duty on account of erroneous availment of the exemption notification and imposed a penalty equal to the amount of duty short levied under Section 11 AC read with Rule 173Q of Central Excise Rules.

D.B.O.T.R.NO.34/2004:

The following substantial question of law has been framed in this appeal for consideration:-

"Is Tribunal empowered to reduce the mandatory penalty imposed under Section 11AC of the Central Excise Act, 1944, while upholding the demand of duty ?"

In this case the assessee was issued a show cause notice for

the purpose of alleged short fall in the stock as per the register and levy of penalty under Section 173Q read with Section 11AC of the Central Excise Act, 1944. The adjudicating authority after rejecting the explanation submitted by the assessee imposed short levied duty and imposed penalty equal to the short levied duty under Section 173Q read with Section 11AC of the Act, 1944.

D.B.CENTRAL EXCISE APPEAL NO.31/06:

In this case respondent is engaged in processing of textile at Pali. A show cause notice was issued on 2/7/1999 calling upon the explanation of the Mills for short levy of duty on the cleared processed fabric from the Mills and also to show cause against the levy of penalty under Section 11AC & Rules 173Q & 226 of the Central Excise Rules, 1944 as they existed at that time. While confirming the demand under the show cause notice, the adjudicating officer also levied penalty equal to the amount of short levy under Rule 173Q and under Section 11AC for different period.

The order of the adjudicating authority dated 1.12.2003/5.12.2003 was appealed against before the CESTAT. The Tribunal while confirming the demand reduced the penalty to Rs.25 lacs.

Hence, in appeal, the following question of law has been framed:-

> "Whether the learned Tribunal is right in law in reducing the mandatory penalty imposable as equal to the amount of Duty under Section 11AC of the Central Excise Act, 1944."

D.B.CENTRAL EXCISE APPEAL NO:52/2006

The following substantial question of law has been framed in this appeal for consideration:-

> "Whether penalty leviable under Section 11AC of the Central Excise Act, 1944 is fixed penalty and cannot be reduced or waived by the Tribunal, once the finding that the penalty is leviable, has been reached ?"

A show cause notice was issued against excess availment of Modvat/Cenvat credit by the manufacturer and calling upon the assessee to recall the excess availed Modvat credit in contravention of Rule 9(1), 57AB, 57AC & 57AE of the Central Excise Rules. Rejecting the

assessee's explanation, the adjudicating authority disallowed the Cenvat credit availed in excess of the permissible limit and imposed a penalty equal to excess availment of modvat credit by resorting to Section 11AC. It may be stated that in the show cause notice no allegation of suppression, fraud or collusion was made. The show cause notice for levy of penalty under Section 11AC and Rule 173Q for alleged contravention of Rule 9(1), 57AB, 57AC & 57AE of Central Excise Rules, 1944 and Rule 13 of the Cenvat Credit Rules, 2001 and for the same reason show cause notice under Section 11 AC was also issued. However, after adjudicating against the manufacturer about the wrong availment of excess Cenvat credit, adjudicating authority raised a demand for excess availed Cenvat Credit and imposed a penalty equal to amount of tax under Section 11AC. While considering the levy of penalty reference was not made to Rule 173Q.

In all these cases the Tribunal upheld the levy of duty against various show cause notices but in the facts and circumstances of the case held that penalty is leviable but reduced it to different sums. It is in the aforesaid circumstances, the substantial question has been referred/framed in each case as noticed above.

Learned counsel for the Revenue in all the cases has relied on the phrase “equal to” used under Section 11AC and has contended

that literally speaking expression “equal to” denotes a comparable measure. Since measure of duty has been provided compared to duty levied, the Tribunal had no jurisdiction to reduce or waive the penalty in case penalty is found leviable. Since in all these cases the penalty has been found leviable, which is apparent from the fact that levy of penalty has been sustained in all these cases though amount of penalty has been reduced, it is submitted that such discretion in view of language used in Section 11AC is not vested in the adjudicating authority or the appellate authority.

Learned counsel for the manufacturer, on the other hand, contends that matter received attention of the Supreme Court in State of Madhya Pradesh reported in 1998 (99) ELT 33. It was a case arising from Madhya Pradesh State Entry Tax Act, 1976. Validity of the provisions relating to levy of penalty equal to ten times the duty was also under challenge apart from the substantive provision. It has been contended that since the use of phrase “equal to” does not leave any discretion upon the assessing authority to levy more or less penalty taking into consideration the relevant facts and circumstances including the mitigating circumstances, if any, & the levy of penalty is confiscatory and ultra vires.

Of course, it was conceded by the counsel appearing for the State that it may be treated that the provisions provide it as the maximum limit and not fixed amount of penalty leaving no discretion for imposition of lesser penalty, while the Court said that "It is not necessary for us to decide whether the provision for levy of penalty equal to ten times the amount of entry tax would be confiscatory and, therfore, ultra vires since Mr.Sanghi, in fairness, submitted that the State treats it as the maximum limit and not fixed amount of penalty leaving no discretion for imposition of lesser penalty."

However, it is only construing the phrase "equal to", "equivalent to", "upto" to treat the measure of penalty provided under the provision to be maximum limit and the assessing authority has the discretion to levy lesser amount of penalty. The Court held that:

"From the aforesaid it follows that Section 7(5) has to be construed to mean that the presumption contained therein is rebuttable and secondly the penalty of ten times the amount of entry tax stipulated therein is only the maximum amount which could be levied and the assessing authority has the discretion to levy lesser amount, depending upon the facts and circumstances of each case. Construing Section 7(5) in this manner the decision of the High Court that Section 7 (5) is ultra vires cannot be sustained.

On this premise, it is further submitted by the learned counsel that following the aforesaid decision, the Gujarat High Court in Ambuja Synthetics Mills vs. Union of India [2004 (175) E.L.T. 85 (Guj.)], & Madras High Court in Commissioner of Central Excise, Tiruchirapalli-1 vs. CEGAT, Chennai [2001 (133) E.L.T. 536 (Mad.)] & in Beauty Dyers vs. Union of India [2004 (163) E.L.T.28 (Mad.)] has construed the provision of 11AC of Central Excise Act as laying down the maximum limit of penalty to be levied and not the fixed amount of penalty and held that discretion to levy lesser penalty than the amount equal to the amount of duty vests with the assessing officer.

It was also urged that Full Bench of the Tribunal has also held that limit prescribed under Section 11AC is the maximum limit and discretion vests with the assessing officer to levy the lesser amount of penalty. It was also pointed out in Sony India Ltd. vs. Commissioner of Central Excise, Delhi [2004 (167) E.L.T. 385 (S.C.)] on which reliance was placed by the learned counsel for the Revenue that question about the quantum of penalty to be levied under Section 11AC had not been raised and decided but having found that the duty was leviable and has been short levied, in the facts and circumstances of the case levy of penalty equal to the amount of duty was upheld. Therefore, Soni India case (supra) does not lay down the proposition throwing any light on the

controversy raised before us.

We are of the opinion that so far as the ratio emerging from Bharat Heavy Electricals case (supra) in terms cannot be invoked while interpreting Section 11AC of the Central Excise Act, 1944 standing alone. The quantum of penalty prescribed under the M.P.State Entry Tax is amount equal to ten times of the duty and it is that quantum of penalty which was under challenge being confiscatory in nature & statutorily a detriment sum. In order to save the said provision being held ultra vires being confiscatory in nature, State has conceded that measure provided under the Act is the maximum limit upto which the duty can be levied leaving it in the discretion of the assessing officer to levy lesser amount of penalty. Accepting such contention the Court held that reading in this manner saves the provision being ultra vires. It was with reference to the quantum of penalty imposable under Madhya Pradesh Entry Tax Act to be the maximum limit, the Court led it down to save it from being ultra vires but Court really did not interpret the meaning of phrase “equal to” to mean “upto” in all circumstances. But it do suggest that if the context warrants in a given case “equal to” in conjunction with discretion vesting in authority to levy penalty,it can also be read as “upto”

In the present case, as we have noticed above that show

cause notice in all the cases have been given for levy of penalty under Section 173Q and 11AC. In some of the cases penalty has been levied equal to duty of amount of tax by considering it to be under Section 173Q read with Section 11AC and in some cases while adjudicating authority levied penalty by referring to Section 11AC and has abandoned the reference to Rule 173Q.

These facts deserve consideration. Rule 173Q envisages that for contravention of Rule by the manufacturer in various circumstances and on various grounds invoke levy of penalty. Rule 173Q of the Rules, 1944 reads as under:-

> "Rule 173Q. Confiscation and penalty.-(1) Subject to the provisions contained in Section 11AC of the Act and Rule 57AH, if any manufacturer, producer, registered person of a warehouse or a registered dealer-
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> (a) removes any excisable goods in contravention of any of the provisions of these rules; or
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> (b) does not account for any excisable goods manufactured, produced or stored by him; or
>
> (bb) takes credit of duty in respect of inputs or capital goods for being sued in the manufacture of final products or capital goods for use in the factory of the manufacturer of final product, as the case may be

wrongly or without taking reasonable steps to ensure that appropriate duty on the said inputs or capital goods has been paid as indicated in the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may, accompanying thereof, or takes credit of duty which he knows or which he has reason to believe, is not permissible under these rules, or does not utilise the inputs or capital goods in the manner provided for in these rules, or utilises credit of duty in respect of inputs or capital goods in contravention of any of the provisions of these rules, or does not render proper and true account of the receipt and disposal of the said inputs or capital goods and the credit of duty taken thereon as required under these rules, or contravenes any of the provisions contained in Section AA or AAA of Chapter V of these rules; or

(bbb) enters wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of such goods which is not permissible under these rules; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under Section 6 of the Act; or

(d) contravenes any of the provisions of these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, **shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in Clause (a)** or clause (b) or clause (bb) or Clause (bbb) or Clause (c) or **Clause (d) has been committed,** or ten thousand rupees, **whichever is greater.**

Provided that where the identity and address of the manufacturer or the supplier is satisfied on the strength of a certificate, the person availing of credit of duty shall retain such certificate for production before the proper officer on demand."

It would be pertinent to notice that Section 11AC clearly provides that penalty under Section 11AC could be levied only where there is short levy or non-levy of duty or wrong availment of any benefit under various notifications is intended action on the part of the assessee to evade payment of duty is an essential ingredient. In other words until short levy or non-levy or excess availing of tax concessions is a result of wilful action on the part of the assessee then only penalty under Section 11AC is leviable and not otherwise, but it uses different circumstances

for levy of penalty; (i) by reason of fraud (ii) by reason of collusion or by reason of any wilful mis-statement or (iii) suppression of facts or (iv) contravention of any of the provisions of this Act or the Rules made thereunder with intent to evade payment of duty.

Of course, all the circumstances are grave enough but amongst them gravity of wilful act or intention differs in degrees. However, under Rule 173Q, under which show cause notices have been issued and with which we are concerned, provides levy of penalty for the same defaults as under Section 11AC, under sub-rule (d) in general terms viz. with intent to evade payment of duty. Bad intention or lack of bonafide is part of Section 11Ac read with Rule 173Q (d). The two had to be read together.

As it is noticed from the provisions of Rule 173Q reproduced hereinabove, the penalty provided is `**not exceeding the duty on the excisable goods or Rs.10,000/-, whichever is greater**'. Significantly, Rule 173Q envisages not only simple contravention of provisions without intention to evade payment of duty for levy of penalty but also includes levy of penalty for contravention of the provisions of the Rules with intention to evade payment of duty and w.e.f. 4/7/1994 it also includes penalty for entering wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods

dealt by him with intent to facilitate the buyer to avail the credit of the duty of excise or the additional duty in respect of such cases. Thus, for even wilful contravention of the provisions to evade payment of duty minimum penalty is leviable upto the sum prescribed but the maximum limit is upto the duty of such excisable goods.

Apparently, Rule 173Q leaves it to the discretion of the assessing officer the quantum of penalty to be levied subject to minimum amount even in cases where the contravention of any provision of the Rules is intended to evade payment of duty or there has been wilful entry of any wrong or incorrect particulars in the invoice for the purpose of facilitating the buyer to avail credit thereof.

Section 11AC read with Rule 173Q in connection with levy of penalty provides the true scope of scheme about levy of penalty in different circumstances and gives clue to the question raised before us. If the two provisions are read, it becomes clear that where the case is governed by Rule 173Q, the penalty which could be levied under Section 11AC is the maximum limit upto which penalty can be levied but discretion vests with the assessing authority to levy lesser amount of penalty subject to minimum amount of penalty mentioned in Rule 173Q. Where the adjudicating authority himself has issued show cause notice under the two provisions and it is within its discretion to levy penalty

with reference to any of the provisions, it cannot be construed as giving him a discretion not to apply his mind to the attending circumstances & the explanation submitted by the assessee where the penalty upto the maximum limit or the lesser amount of penalty could meet the ends of justice. The assessee has paid the amount of duty voluntarily that mitigates the default made by him.

It is also clear from the amendment brought in Section 11AC by way of inserting second proviso that where the duty determined under sub-section (2) of Section 11A along with interest thereon is paid within thirty days from the date of notice of demand, the amount of penalty has to be reduced to 25% of the duty levied. Thus, prescribing minimum leviable penalty, since amendment under Section 11AC, to 25% of the duty on deposit of the amount for which demand has been created along with interest within prescribed time and waived amount over and above it. Therefore, keeping in view this provision, we are persuaded to hold that where show cause notice under Section 11AC as well as 173Q has been issued for the same defaults, the assessing officer cannot overlook the provisions of Rule 173Q for the purpose of levying maximum penalty only using his discretion to levy penalty under Section 11AC without considering the provision of Rule 173Q. If he has discretion to use, and case is made out for imposing lesser penalty, he cannot use his discretion not to invoke the provisions of Rule 173Q at all and insist

on levying maximum penalty only.

The two provisions read together make it fairly clear that the limit of penalty provided under Section 11AC serves as a maximum limit upto which penalty could be levied but the assessing officer in his discretion may levy lesser penalty.

Since all the cases, as noticed by us, fall under Section 11AC & 173Q, therefore, no interference is called for in the orders passed by the Tribunal in reducing the penalty. Since reduction of penalty is sought to be challenged only on the basis of interpretation of Section 11AC and not on merits, we are not further examining the question whether levy of penalty itself in each case was justified or not.

The appeals are, therefore, dismissed. The questions referred are answered in affirmative in favour of assessee and against the Revenue by holding that Tribunal has power to reduce the penalty imposable under Rule 173Q as well as Section 11AC and it being not the case of Revenue that penalty was imposable under both the provisions separately and independently, the harmonious consideration of two provisions lead to a conclusion that limit of penalty provided under Section 11AC is the maximum limit upto which penalty can be levied. Now such minimum penalty in the case of intentional breach,

Section 11AC itself has been reducible to 25% by dint of proviso referred to hereinabove. Therefore, there was no error on the part of the Tribunal in reducing the penalty when it found that levy of maximum penalty was not justified.

No costs.

(GOPAL KRISHAN VYAS), J. (RAJESH BALIA), J.

Pankaj Baweja